No. 87-854 (3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Attorney for Petitioners

Of Counsel:

REX H. REED
National Right to Work Legal Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE, BAUGHER & HEDGE
500 First National Bank Building
801 Lincoln Way, Suite 500
P. O. Box 1161
La Porte, Indiana 46350
(219) 362-3181

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PETITIONERS' REPLY BRIEF

I. DENIAL OF CERTIORARI BY THIS COURT HAS NO PRECEDENTIAL VALUE.

Initially, the Respondent argues that the Petition should be denied because petitions in similar cases were denied during the 1986 term of this Court. *See Abels v. Monroe County Education Association*, ____ U.S. ____, 107 S. Ct. 1347 (1987); *Stewart v. New Prairie Classroom Teachers Association*, ____ U.S. ____, 107 S. Ct. 1370 (1987).

Such denials have no value as precedent. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.). And, in particular, a

denial of certiorari does not mean that the prior case was correctly decided.

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.

Id.

II. THE METHOD OF CALCULATION APPROVED BY THE INDIANA COURT OF APPEALS CANNOT SURVIVE UNDER PROPER FIRST AMENDMENT ANALYSIS.

A. *The Decision Below*

Secondly, the Respondent argues that the Petitioners' claims are based upon a mischaracterization of the opinion of the Court of Appeals. However, it is the Respondent that has mischaracterized the decision below.

In deciding this case the Indiana Court of Appeals made no new independent analysis of the issues. Instead, it blindly relied on its prior, erroneous decisions in *Abels v. Monroe County Educ. Ass'n*, 489 N.E.2d 533 (Ind. Ct. App. 1986), *reh'g denied*, 490 N.E.2d 775, *cert. denied*, _____ U.S. _____, 107 S. Ct. 1347 (1987), and *New Prairie Classroom Teachers Ass'n v. Stewart*, 487 N.E.2d 1324 (Ind. Ct. App. 1986), *cert. denied*, _____ U.S. _____, 107 S. Ct. 1370 (1987). *See* Appendix, p. 2a. That those cases involve a dues-less-rebate calculation is shown by the following quotation from *Abels*, 489 N.E.2d at 539:

> Appellants proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses. (Citations omitted.)

The cases of this Court referred to by the Court of Appeals are *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961). In those cases this Court did not utilize a "least restrictive means" analysis and, as shown below, the First Amendment requires utilization of that test. *Allen* and *Street* are inapposite to the issues raised here.

B. *Petitioners Contest The Failure Of The Court Of Appeals To Require Proof Of The Cost Of Providing Services To Their Bargaining Unit.*

Thirdly, the Respondent argues that the second question really involves a mere disagreement with the factual conclusions reached by the court below and that in raising it the Petitioners disregard the record in the case. Apparently, the Respondent does not perceive the issue.

Petitioners contend that before fees for affiliated organizations may be awarded, it must be shown that the expenses were incurred on behalf of Petitioners' bargaining unit. The record below is clear that no proof was offered as to how much money either ISTA or NEA spent in providing services to the exclusive representative in this case. Petitioners argue, then, as a matter of law,

that that failure is fatal to the claim for fees for the affiliated organizations. This Court has indicated that such proof is required. *Ellis v. Railway Clerks*, 466 U.S. 435, 448, 453 (1984); *and see* Petition at pp. 16-23. The absence of proof of the costs entailed in providing collective bargaining services to the unit to which the Petitioners belong is fatal to the claim for fees for ISTA and NEA.

C. *The "Least Restrictive Means" Test Is The Required Form Of Analysis In This Case.*

At pages 14-17 of the Opposition, and particularly in the footnotes on those pages, the Respondent argues that the rationale of this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), is not applicable in Indiana because unions must bring suit in order to coerce payment of the fees. This Court's decisions in *Tierney v. City of Toledo*, ____ U.S. ____, 106 S. Ct. 1628 (1987), and *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. 1063 (1986), clearly show that *Hudson* procedures are required in Indiana. This conclusion is buttressed by the Sixth Circuit's decision after remand in *Tierney v. City of Toledo*, 824 F.2d 1497 (1987) (*Hudson* procedures must be provided before money may be collected), and *Ellis v. Western Airlines*, 652 F. Supp. 938 (S.D. Cal. 1986) (nonpayer may not be discharged in the absence of a valid *Hudson* procedure).

Implicit in the Respondent's arguments is the notion that the First Amendment permits the more onerous of two feasible alternatives to be required. In effect the argument admits that many of the people ISTA and NEA are required to represent do not have an obligation to pay and that these Petitioners must, therefore, be required to pay a portion of what it costs to represent

those other "free riders." But that result is precisely why the method previously approved by the Indiana Court of Appeals cannot survive proper First Amendment scrutiny.

In *Hudson* this Court makes it clear that it is First Amendment rights that are touched by agency fees.

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

Hudson, 475 U.S. at 303. Note 11 to the above text states:

> See *Roberts v. United States Jaycees*, *supra* [468 U.S. 609], at 623 (Infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"), *Elrod v. Burns*, 427 U.S. 347 (1976) (government means must be "least restrictive of freedom of belief and association"); *Kasper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in the First Amendment context).

It is these precedents that should have guided the Indiana Court's decision and not *Street* and *Allen* which were relied on by the Indiana Court of Appeals in *Stewart* and

Abels. No issue was raised in *Street*, *Allen* or *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), concerning the proper way to calculate a pro rata share. The issue is raised here, and *Hudson* makes it clear that the procedure, including the method of calculation, must be "carefully tailored to minimize the infringement." *Id.*, 475 U.S. at 303.

Public sector agency shops are justified by the desire for labor peace and the elimination of the "free rider". *Abood*, 431 U.S. at 224, 97 S. Ct. at 1794. Both of those goals are satisfied if a nonmember is required to pay a pro rata share of what it costs the union to provide the individual with services. In *Daily v. Woburn Teachers Association*, 13 MLC 1555 (1987), the Massachusetts Labor Relations Commission, an expert administrative agency with expertise in this area, identified two methods that a union could use to calculate a service fee for nonmembers. One of those is the method approved by the Indiana Court of Appeals in *Stewart* and *Abels* and the other is the method urged here by the Petitioners. Either one is a feasible way of making the calculation; but where, as here, use of one method produces a significantly greater injury to the First Amendment interests of the individual, *Hudson* and the other First Amendment cases cited, *supra* at 5, require that the other method be used because that is the method that ". . . is carefully tailored to minimize the injury." *Hudson*, 475 U.S. at 303.

The Indiana Court of Appeals did not apply a "least restrictive means" analysis in *Stewart*, *Abels*, or this case. However, *Hudson* requires the use of that test. The first question presented asks whether the First Amendment permits a dues-less-rebate calculation or whether an

agency fee must be based on a pro rata share of the proven costs of collective bargaining.

The record below clearly shows that a pro rata share is much less than the dues-less-rebate figure approved by the Indiana Court of Appeals. Thus, the First Amendment violation which is caused by the decision below is apparent.

The simple question—how do you calculate an agency fee—is fundamental, and the answer affects every agency fee payer in the country in both the public and the private sectors. The court below misinterpreted this Court's agency fee decisions in *Hudson*, *Ellis*, *Abood*, *Allen*, and *Street* and reached the wrong answer. The need for further guidance from this Court in this sensitive area impacting on First Amendment interests is clear. The petition should be granted in order to provide the lower courts with guidance that is obviously necessary.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition the Court should grant the petition and set the case down for plenary briefing and argument.

Dated April 5, 1988

Respectfully submitted,

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorney for Petitioners

Of Counsel:

REX H. REED
National Right to Work Legal
Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE,
BAUGHER & HEDGE
500 First National Bank Building
801 Lincoln Way, Suite 500
P.O. Box 1161
La Porte, Indiana 46350
(219) 362-3181